In the Supreme Court of the United States

OCTOBER TERM 1944

No. 1195

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY,
Petitioner,
vs.
ABRAHAM GOLDBERG,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari.

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Petitioner, in support of Writ of Certiorari, relies mainly on the case of *New York Life Insurance Company v. Levine,* 148 Fed. (2d) 313 (C. C. A. 3). The *Levine* case is not in conflict with the decision of the United States Circuit Court of Appeals in the case at bar (158 Fed. 2d 971). In the *Levine* case, as to Policy Number 155, the Court rendered judgment in favor of the insured for premiums paid after proof of disability was submitted to the insurance company. The basis of that judgment was that the insurance company, in writing, agreed to refund the premiums paid after proof of disability was filed, if it approved the proof. In the case at bar the company, in writing, represented to the insured and to the Court that, in the event the insured prevailed on the merits in the prior action, the insurance company would return to the insured all premiums paid from the time the insured became disabled. The insured did prevail in that action (*Columbian National Life Ins. Co. v. Goldberg,* 321 U. S. 765).

The Respondent originally filed a petition of a declaratory judgment in the Court of Common Pleas of Mahoning County, Ohio, in 1939. The insurance company filed a Petition to remove the cause to the U. S. District Court. In its Petition for removal it represented to the Common Pleas Court and the insured that the premiums he paid after he filed his proof of disability were part of the amount in controversy. The same premiums are the subject matter of the instant case. Thereafter the insured filed in the District Court a Motion to Remand the cause to the Court of Common Pleas of Mahoning County, Ohio, claiming that there was not $3,000 involved in the controversy. The insurance company, in order to show that the controversy involved more than $3,000, and that the District Court had jurisdiction of the cause, represented by briefs in writing, to the Court and to the insured, just as the New York Life Insurance Company represented to Levine, in Policy Number 155, that if the proof of disability were approved, the premiums would be returned to the insured.

In a Brief filed on February 12, 1941 (R. p. 126), in support of its claim that the amount in controversy included the return to the insured of premiums he paid from the time he filed his proof of claim for disability, the Columbian National Life Insurance Company represented, in writing, to the Court and to the insured, that

> "Under the form of the petition for equitable relief the Court could properly form its decree so that plaintiff would be entitled to the return of the premiums paid during the disability in the sum of $1836." *

In the same Brief (R. p. 125) the Columbian National Life Insurance Company represented to the Court and this insured, in writing

> "The amount in controversy here apart from the reserves set up by the defendant is $4,916.00.

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* The insured paid the company $1836 from the time he filed his proof of disability until he filed suit.

This sum is made up of $1,836.00 premiums paid by plaintiff since his claimed disability arose July 1, 1938, to the filing of this action December 11, 1939, at the rate of $102.00 per month. If in addition the court grants plaintiff's prayer to change his date of birth as stated in the policy from December 15, 1878, to December 15, 1880, the insurance coverage will be increased by $3,080.00. This gives a total figure of $4,916.00."

In a brief filed February 20, 1941 (R. pp. 135, 136, 137) the Columbian National Life Insurance Company represented to the Court and this insured, in writing, the following:

"It must not be overlooked that in addition to declaratory relief, equitable relief is also sought. The prayer of the petition is for declaration of disability, waiver of premium, reformation of the date and *'for such other and further relief as to this Court seems just and proper.'*

"In 21 *C. J.* 679, Section 858, it is said:

'A prayer for general relief is as broad as the equitable powers of the court.'

"We quote from *State ex rel vs. Beamer,* 109 O. S. 133 at 150:

'It is so well established as to require no argument that the prayer of a petition cannot restrict the nature of the relief which the facts authorize. The fact that the plaintiff prays only partial relief will not prevent entire relief. *Bloch v. Koch,* 1 Wkly. Law Bul., 91, 8 Dec. Rep. 54, affirmed *Koch v. Bloch,* 29 Ohio St. 565; *Riddle v. Roll,* 24 Ohio St. 572.

'Under a prayer for general relief, the court will shape its decree according to the equity of the case, and, properly speaking, will grant any relief warranted by the allegations of the bill. 21 *Corpus Juris,* 679. The allegations of the petition, as admitted by the answer, justify a decree herein relating to the providing of high school branches.'

"The declaratory judgment act expressly provides for the granting of further relief, when necessary or

proper. It is said in *Stephenson vs. Equitable Life Assur. Soc.*, 92 Fed. 2d 406 at 410:

'The fact that, in addition to asking judgment declaring the rights of the parties in the premises, plaintiff asked a recovery of the past-due disability installments, does not detract from the power of the court to grant the declaraory relief. *Upon the court's declaring the rights of the insured under the policy in accordance with his contentions, he would have been entitled to recover these installments*; and the second paragraph of the act expressly provides for the granting of further relief whenever necessary or proper.'

"In *Am. Jur.* 338, Section 71, it is stated:

'It has been said that in an action for a declaratory judgment, the rights of the parties are to be determined upon the *facts found*, and that the court is not limited by the issues joined or by the *claims of counsel.*'

"This defendant could not safely appear and defend this case without being prepared upon all phases of the case within the limits of the relief that would be warranted under the petition. This is the reason why we said in our original brief that, if plaintiff prevails on the merits, this Court could so form its decree as to require repayment of the premiums paid during disability and the addition of $3080.00 to the face amount of the policy." (All italics by the insurance company.)

In the same brief, the Columbian National Life Insurance Company represented to the Court and the insured (R. p. 137):

"This is a suit brought for two express purposes, one of which is to recover these premiums * * *"

The insurance company does not deny that it made the above-quoted written representations to the Court and to the insured. In its brief filed in this Court, at page 12, it states:

"This statement was due to a misconception of the breadth of relief permitted under a general prayer."

Regardless of what the insured claimed to the contrary, the fact is that the Court adopted, not the claim of the insured, but the claim of the insurance company and the following language of the Honorable Robert N. Wilkin, District Judge (R. pp. 74 and 75) is apropos:

> "Although the plaintiff did not specifically ask in the former case for a return of such premiums, the defendant, in its brief opposing the motion to remand, contended that such was the effect of the case and that such premiums should be considered in determining the amount in controversy. The defendant should, therefore, not be much aggrieved if the Court now adopts its contention, as it did then."

The Circuit Court of Appeals, in the prior action, had to determine if the return of premiums was involved in that prior suit, in order to ascertain if it had jurisdiction to determine the appeal of the insurance company. In its decision, 138 Fed. 2d 192, the Court stated:

> "Since July 1, 1939, when appellee furnished appellant with written proof of his disability, the total amount of premiums required to be paid under the policy already exceeds Three Thousand Dollars; and the insured yet lives. The United States District Court possessed jurisdiction to enter the declaratory judgment."

This Honorable Court denied the Petition for Writ of Certiorari directed to the judgment of the Circuit Court.

We respectfully submit that the written representations made by the insurance company to the Courts and to the insured that, if he was successful in establishing the facts contained in this proof of disability, he would be entitled to the return of the premiums he paid from the time he was disabled, is exactly the same as the representation the New York Life Insurance Company made to Levine in Policy Number '155, which is as follows:

> "* * * (premium payment) due after the receipt of said proof will, if paid, be refunded upon approval of such proof."

The Court, in the *Levine* case, affirmed the order of the lower court awarding Levine a money judgment for premiums paid from the time he filed proof of disability, on Policy Number '155. The insurance company cannot rely on language used by the Court in the *Levine* case as to Policy '820 because the facts are that the representations made by the insurance company in briefs, relied upon by the Courts and the insured, are the same as the language used by the New York Life Insurance Company, in Policy Number '155, and the holding of the District Court and Circuit Court of Appeals in the case at bar is identical with the holding of the Circuit Court of Appeals in the *Levine* case as to Policy Number '155.

We also respectfully submit that the following Pennsylvania cases are not in point:

Sebastinelli v. Prudential Life Insurance Co., 12 Atl. (2d) 113;

Astrin v. Metropolitan Life Insurance Co., 17 Atl. (2d) 887;

Feigenbaum v. Prudential Insurance Co., 19 Atl. (2d) 542.

Those cases specifically involve actions at law for the recovery of a money judgment for premiums paid from the time of the happening of the disability until the institution of suit by the insured for their recovery. This case at bar is one based on a final judgment that the insured was not required to make premium payments from July 1, 1939. It is an action in equity and accounting for credit on the policy loan of premiums paid from the time of the filing of the suit until its final adjudication by this Court. Indeed, there is an intimation in the above cases, as set out in the opinion of Circuit Court of Appeals, that premium payments made after suit was brought might stand on a different basis from

> "* * * voluntary premium payments made after disability began and before suit was brought."

We respectfully submit that the decision of the Circuit Court of Appeals, in the prior case, which is reported in 138 Fed. 2d 192, and which decision this Honorable Court refused to disturb, having denied Petition for Writ of Certiorari in 321 U. S. 765, is *res adjudicata* and the law of the case as to all present claims of the insurance company. In the prior decision the Court held that the insured was not required to make premium payments. In the case at bar the court held that he should be given credit for them on his policy loan. For four years after the finding of the District Court, to which a Petition for Writ of Certiorari was denied, that the insured was not required to make premium payments, the company continued to litigate the insured and take his money. It received these premium payments contrary to the judgment of all the Courts including this Court. The insurance company does not and cannot claim, that if the return or credit on the loan of the insurance premiums paid from the time proof of disability was filed was an issue in the original case, which contention they not only made but which contention the Courts actually adopted, that the insured is not entitled to the relief prayed for in his present suit. The company knew, and we now use their language, that

> "This defendant could not safely appear and defend this case without being prepared upon all phases of the case within the limits of the relief which would be warranted under the petition."

They knew that, and again we borrow their language,

> "* * * this Court could so form its decree as to require repayment of premiums paid during disability * * *"

They knew that, and again we borrow their language,

> "This is a suit brought for two express purposes, one of which is to recover these premiums. * * *"

Knowing as they did from the time they removed this case from the Common Pleas Court of Mahoning County,

Ohio, that one of the issues in the original action was the recovery of premiums paid during disability and knowing as they did that they had to be prepared upon all phases of the case within the limits of the relief which would be warranted under the petition and admitting as they do that included within the limits of relief under the petition was the return of the premiums, they were required, in the original action, to plead and prove the law of Pennsylvania in regard to voluntary payments which they now urge to this Court. The insurance company took the position and made the open, forthright statements that the repayments of the premiums, was involved as a judicial fact in the original case. The Court relied on these statements, and sustained the position of the insurance company. We feel that the insurance company is estopped, by its representations, conduct and statements in the former case, from denying the fact that the judgment therein declaring the rights of the insured in accordance with his contentions necessarily includes the right to recover the premiums actually paid during his disability. The self same insurance company now states that by reason of the law of Pennsylvania, the Court cannot now so decree. If the Court cannot now so decree, the insurance company was guilty of misrepresentation to the Court in its briefs on the hearing on the motion to remand.

We wish to further point out to the Court that the insured, too, had the right to rely on the representations made by the insurance company to this Court that the return of the premiums paid during his disability was an issue involved in the former case and that if he was successful therein he would be entitled to a return of the premiums paid during his disability.

This Court always takes judicial notice, especially of written representations and statements made by the same parties in litigation, involving the same matter; and we think that the Court not only could well say but is in fact

bound to say that the insurance company invoked the jurisdiction of this Court by representing to the Court and to the plaintiff that a decree favorable to plaintiff in the former action would be tantamount to ordering return of the premiums paid during disability. The doctrine and principle of *res adjudicata* operates as to defenses as well as causes of action of a plaintiff. If it was right about the law of Pennsylvania as it now contends it to be, the insured would have had a prompt adjudication and would have been out very, very little in premium payments. Instead, the company took the insured's money and didn't plead the law of Pennsylvania as it now urges it. It is now barred, in the case at bar, from so doing. In 23 *Ohio Jurisprudence,* Section 748, pages 979 and 980, wherein it was stated:

> "In cases where there is identity of parties or their privies, subject-matter, and causes of action, it has been declared to be the settled law of Ohio that a former judgment is conclusive between the parties and their privies, not only as to matters actually determined, but also as to any other matters which could, under the rules of practice and procedure, have been determined. In a judicial proceeding in a court of record, where a party is called upon to make good his cause of action, he must do so by all the proper means within his control, and if he fail in that respect, purposely or negligently, he will not afterward be permitted to relitigate the same matter between the same parties. If a party fails to plead a fact he might have pleaded, or fails to prove a fact he might have proven, the law can afford him no relief."

The company, it is evident, purposely knew it was called upon, in the original action, to make good its defense of the law of Pennsylvania which it now raises. It purposely did not do so but instead took the payments, contrary to the judgment of the lower courts. Honorable Robert N. Wilkin, District Judge, was right in holding the following:

"But in order to give effect in this case to the judgment in the former case here, this Court holds the plaintiff entitled to all disability benefits subsequent to the filing of the former petition. While it is true that no money judgment was given in the former case, this Court holds, in view of the prayer in this case for accounting, that the plaintiff should be given credit on the amount due from him to the defendant company on the policy loan, for the amount paid by him to the company after December 11, 1939."

"The former case between these parties was appealed to the Court of Appeals and a petition for writ of certiorari was filed in the Supreme Court. The defendant continued to receive payments on the policies during the whole period that such litigation was pending, for more than four years. It would be a denial of judgment given in the former litigation if the defendant were now allowed to retain the protested premiums which it received contrary to the judgment of the court and recover from the plaintiff the full amount of his obligation to it. Both by the protest which it received and by its arguments advanced in this Court regarding the amount involved, the defendant is now charged with knowledge that the premium payments were not voluntary, and in view of all the circumstances it would be inequitable and a nullification of its former order if this Court now held such payments to have been voluntary."

The language of the Circuit Court of Appeals is apropos:

"It was well reasoned, on application for rehearing, that if the insurance company were permitted to retain the premiums paid while the insured was asserting in his declaratory judgment suit his non-liability for such for such payments, the judgment rendered therein would be in effect denied. The insurance company knew that in the circumstances the premiums were not being voluntarily paid in any true sense of the word 'voluntary.' The fear of Goldberg that he might be cast in his pending suit was manifestly a very real fear. Obviously, he felt that he might be risking

his all under the policy, if he should fail to win. Payment by the victim of such fears is not a free will offering. As was reasoned by the district court, it would be an inequitable nullification of the declaratory judgment previously rendered to hold voluntary the premium payments made by Goldberg during the pendency of his suit. We held that he was not obligated to make the payments. He should be given proper credit for them on his policy loan."

The principles of fair play, justice, *res adjudicata*, legal and equitable estoppel, we respectfully urge, require this Court to deny the Petition for Writ of Certiorari.

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